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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and  
Respondent,

v.

NORMAN BLANCO,

Defendant and  
Appellant.

B286116

(Los Angeles County  
Super. Ct. No.  
MA067528)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed in part and remanded.

Lori E. Kantor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

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The jury found defendant and appellant Norman Blanco guilty of possession of contraband in prison. (Pen. Code, § 4573.6, subd. (a).)<sup>1</sup> In a bifurcated bench trial, the trial court found true the allegation that Blanco had suffered a prior serious or violent felony conviction within the meaning of the three strikes law. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).)

The court denied Blanco’s motion to strike his prior strike conviction under *Romero*,<sup>2</sup> and sentenced him to six years in state prison, consisting of the middle term of three years, doubled pursuant to the three strikes law. The court ordered this six-year sentence to run consecutive to the term of imprisonment Blanco was serving at the time of the instant offense.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Blanco requests that this court review the in camera hearing held pursuant to *Pitchess v. Superior Court*<sup>3</sup> to determine whether the trial court abused its discretion by refusing to disclose material in Sergeant Villalobos's personnel files relating to dishonesty and fabrication of evidence. Blanco also contends that the trial court did not recognize it had discretion to run his six-year sentence concurrently with the prison sentence that he was already serving. He requests that we remand the cause for the trial court to determine whether to exercise its discretion to impose a concurrent sentence.

The Attorney General agrees that this court may review the in camera *Pitchess* hearing to determine whether the trial court abused its discretion when it determined not to disclose documents relating to Sergeant Villalobos. With respect to Blanco's sentencing contention, the Attorney General asserts Blanco forfeited the claim by failing to raise it below, but that it lacks merit regardless, because he has failed to affirmatively demonstrate error.

We have reviewed the in camera hearing and conclude that the trial court did not abuse its discretion in declining to disclose certain items from Sergeant Villalobos's personnel file. We further conclude that whether the trial court recognized that it had discretion to impose either a concurrent or consecutive sentence is ambiguous, and we remand for the limited purpose of allowing the trial court to

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<sup>3</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

exercise its discretion in that regard. In all other respects, the judgment is affirmed.

## DISCUSSION<sup>4</sup>

### *Pitchess Motion*

Prior to trial, the trial court granted Blanco's *Pitchess* motion, which sought discovery of the personnel files of Correctional Officer Hicks, Correctional Officer Hodges, and Sergeant Villalobos relating to dishonesty and fabrication of evidence. Blanco challenges the trial court's determination not to disclose certain records with respect to Sergeant Villalobos and requests that we independently review the sealed transcript of the in camera hearing.

A criminal defendant is entitled to the discovery of confidential police officer personnel records if the information contained therein is relevant to his ability to defend against the charge. (*Pitchess, supra*, 11 Cal.3d at pp. 537–538.) To obtain such records, the defendant must submit an affidavit showing good cause for the discovery. (Evid. Code, § 1043, subd. (b)(3).) A showing of good cause requires a defendant seeking *Pitchess* discovery “to establish . . . a logical link between [a proposed defense] and the pending charge” and “to articulate how the discovery being

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<sup>4</sup> We do not include a statement of facts because resolution of the claims Blanco raises does not require consideration of the facts underlying his conviction.

sought would support such a defense or how it would impeach the officer's version of events." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021.) Discoverable information is "limited to instances of officer misconduct related to the misconduct asserted by the defendant." (*Ibid.*; see *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1021, italics omitted ["[D]ocumentation of past officer misconduct which is similar to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery."].)

Under *People v. Mooc* (2001) 26 Cal.4th 1216, at pages 1229 through 1232, upon a request from a defendant, an appellate court may review the sealed transcript of a trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant documents. A trial court's ruling on such a motion is reviewed for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

In response to Blanco's request, we reviewed independently the sealed transcript of the trial court's in camera hearing on his *Pitchess* motion. We conclude that the trial court did not abuse its discretion.

### ***Consecutive Sentence***

At the sentencing hearing, the trial court imposed a consecutive term of six years (the middle term of three years, doubled pursuant to the three strikes law) for Blanco's possession of contraband in prison. Blanco contends that the

trial court did not recognize that it had discretion regarding whether to impose a concurrent or consecutive sentence, and requests that we remand the matter for resentencing. The parties agree that the court was not required to impose a consecutive sentence under section 1170.1, subdivision (c), but disagree with respect to whether the trial court understood it had that discretion. We conclude that the record is ambiguous on this point, and remand for the trial court to exercise its discretion.

### **Law**

Section 1170.1, subdivision (c) provides that when a person is convicted of a felony while in prison and “the law either requires the terms to be served consecutively or the court imposes consecutive terms,” the consecutive terms are to commence when the person would have been released from prison. In the past, this language was interpreted to require imposition of consecutive sentences when a defendant committed a felony while in prison (*People v. Lamont* (1986) 177 Cal.App.3d 577, 584), but the Court of Appeal, Fifth District has since disapproved its prior ruling and held that trial courts have discretion to impose either a concurrent or consecutive sentence unless a consecutive sentence is statutorily mandated (*People v. Arant* (1988) 199 Cal.App.3d 294, 298). Section 4573.6, subdivision (a) does not mandate that a sentence be served consecutively;

therefore, a sentencing court may elect to impose either a concurrent or consecutive sentence.

“Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. (See *United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741.) A court that is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. (See *People v. Ruiz* (1975) 14 Cal.3d 163, 168.)” (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

### **Proceedings**<sup>5</sup>

In its sentencing memorandum, the People stressed that the court had discretion “to choose what term of imprisonment the defendant should serve.” The prosecutor urged the court to impose the maximum sentence of eight years. The memorandum did not address whether the

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<sup>5</sup> Blanco also relies on the court’s statement, made prior to trial, that his maximum exposure would be an 8-year consecutive term; however, the trial court did not indicate in making that statement that imposing a consecutive sentence was mandatory. The statement accurately describes Blanco’s maximum exposure; it does not shed any light as to whether the court believed a consecutive sentence was mandatory.

sentence should be imposed concurrently with the term that Blanco was then serving, or consecutive to that term.

When arguing the factors in mitigation, defense counsel stated, “I’ve seen him here remain soft spoken, being upset, *knowing that the law requires a mandatory consecutive sentence*, and he’s done his best.” (Italics added.) Counsel urged the court to grant Blanco’s *Romero* motion, but “in the alternative, to let Mr. Blanco serve the low term if the court’s not inclined to strike a strike *because the sentence is mandatory consecutive*.” (Italics added.) Neither the parties nor the trial court corrected the misconception that imposition of a consecutive term was required, and there was no discussion of the possibility of running the term concurrently.

Finally, in imposing sentence, the trial court stated, “This matter is fully consecutive pursuant to Penal Code section 1170[, subdivision] (c)<sup>[6]</sup> as the defendant was currently serving a term of incarceration on the case.”

### **Analysis**

The People argue that Blanco forfeited his claim by failing to raise it below. Although failure to timely raise a

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<sup>6</sup> Section 1170, subdivision (c) requires the trial court to state the reasons for its sentencing choice, including the imposition of consecutive sentences, on the record. (See Cal. Rules of Court, rules 4.406(b)(5), 4.406(b)(6); *People v. Sandoval* (2007) 41 Cal.4th 825, 850.)



sentencing issue in the trial court forfeits the issue for appellate review (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218), we may exercise our discretion to consider the issue nonetheless (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6). We will do so here.

Neither the discussion at the sentencing hearing nor the trial court's oral pronouncement enable us to say with confidence that the trial court exercised its discretion with respect to whether to impose either a concurrent or consecutive term. The court's language is ambiguous, and all discussion of the matter rested on the incorrect assumption that imposition of a consecutive term was required. Because we cannot determine whether the trial court understood that it had discretion in sentencing Blanco to impose either a consecutive or concurrent term, we remand for the limited purpose of allowing the court to exercise its discretion to either impose a concurrent or consecutive term.

## DISPOSITION

We remand for the limited purpose of allowing the court to exercise its discretion to either impose a concurrent or consecutive term. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

JASKOL, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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BAKER, Acting P. J., Concurring in Part and Dissenting in  
Part

I would affirm the judgment in full. I agree with the majority's disposition of defendant's *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 contention. I would hold, however, that defendant forfeited the argument that reversal is required because the trial court was unaware of its discretion to impose a concurrent sentence—an argument that, in any event, runs contrary to law. (See, e.g., Evid. Code, § 664; *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1178-1179.)

BAKER, Acting P. J.